Supreme Court, U.S.
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No. 00-384

IN THE

# Supreme Court of the United States

DENNIS L. MARTIN,

*Petitioner,*

v.

BARNESVILLE EXEMPTED VILLIAGE SCHOOL DISTRICT BOARD OF EDUCATION,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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II. SHOULD THIS COURT GRANT A WRIT OF CERTIORARI TO REVIEW QUESTIONS FOR WHICH THERE IS NO CONTROVERSY OR CONFLICT AMONG THE CIRCUITS, BUT RATHER ARE A MATTER OF EXPRESSED STATUTORY LANGUAGE?

III. SHOULD THIS COURT GRANT A WRIT OF CERTIORARI TO REVIEW QUESTIONS WHICH PRESENT CONFUSION ONLY TO PETITIONER, AND NOT AMONG THE CIRCUIT COURTS?

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## COUNTER STATEMENT OF THE CASE

The United States District Court for the Southern District of Ohio correctly determined that:

> Plaintiff must [show] that the 'record of' impairment, or the impairment that he is 'regarded as' having, is one that *substantially limits a major life activity*. *** Plaintiff **did not allege in his complaint, nor has he argued or demonstrated** in response to Defendants Motion, that the LCA establishes that he is *substantially limited in a major life activity*, or that Defendant regarded him as having an impairment that *substantially limits a major life activity*.

R.30 Order Granting Summary Judgment, p. 9 (Emphasis theirs).

The trial court essentially found that Martin must prove that the alleged "record of" impairment or the "perceived" impairment is one that *substantially limits a major life activity*, (or is perceived as being so limiting) and that Martin entirely failed to put forth an argument and establish this burden.

While not disagreeing with the trial court's reasoning, the Sixth Circuit Court of Appeals affirmed the decision of the district court on a different ground. Instead of deciding the case based upon the fatal errors in Martin's *prima facie* case (*i.e.*, failing to produce evidence of a perception of alcoholism and failure to even allege a perceived substantial limitation), the court of appeals took a more rigid stance and

declared the case law of *Maddox v. Univ. of Tenn.*, 62 F.3d 843 (6th Cir. 1995), controlling, holding that Martin's own misconduct (rather than the unproven perception of alcoholism) was a legitimate and non-discriminatory reason for his denial of the school bus driver position.

## STATEMENT OF FACTS

Barnesville Exempted Village School District BOE (herein after "Barnesville"), in accordance with S.Ct.R. 15 (2) with respect to the content of a Brief in Opposition, wishes to draw this Court's attention to the misstatements and omissions of Petitioner Dennis L. Martin (hereinafter "Martin") that are directly relevant to issues presented herein.

First, the Petition submitted by Martin is replete with mischaracterizations, understatements, and overstatements as to the facts and law in this case. The Petition also exhibits a fundamental misunderstanding with respect to the law and interpretations of law surrounding the "record of" and "regarded as" prongs of the ADA's *prima facie* showing for a disability. There are many fatal flaws - most of which defy common sense interpretation of the language of the statute and the regulations or interpretive guidelines on the subject. Many of these misunderstandings are addressed specifically in the Law and Argument portion of this brief, as necessary

Second, as the Court may well have already discerned, this case involves an incident of misconduct in 1991 whereby Petitioner Martin was caught drinking on his job as a custodian at an elementary high school. Three years later Martin applied for a bus driver position within the school district. Martin was denied the bus driver position because of his 1991 misconduct, and because the school officials (without any knowledge or perceptions of any alcoholism on the part of Martin) could simply not take the chance that Martin would attempt to engage in similar misconduct while holding the bus driver position.

With respect to the detailed facts as set forth by Martin, there are several key omissions. While Martin admits to having been "discovered" drinking beer while on his job as a custodian at an elementary high school in 1991, Martin fails to discuss the relevant circumstances surrounding the incident. Martin was caught by Robert Miller, President of Barnesville's Board of Education. Once caught, Martin RAN from Board President Miller, HID, and attempted to throw away the remaining six pack of beer. When confronted, Martin LIED about the fact that he had any beer on premises, and DENIED that Board President Miller had seen what he claimed. It was only AFTER the other cans of beer were discovered that Martin admitted bringing the beer to the elementary school. When questioned further, after the extra beer was found, Martin walked off the job leaving the elementary school building otherwise unattended. The Superintendent at the time, David Wilson, recommended that Plaintiff be terminated for reasons of:

- consuming alcohol at work
- leaving his work incomplete

- leaving the building without adequate employee coverage and
- for conduct in direct violation of the Defendant's "drug free work place" policy, constituting misfeasance and nonfeasance of duty

Thus, Martin was not disciplined because he was perceived to have an impairment that substantially limited any major life activities, or because he was perceived as an alcoholic. Martin was disciplined because he violated Barnesville rules, lied, and walked off the job. Ultimately, because it was around Christmas time, Board President Miller decided to give Martin a last chance, and the parties entered into a last chance agreement (hereinafter "LCA"). In this agreement, Martin accepted a suspension from employment without pay, waived procedural irregularities, stated that he had a drinking problem, and agreed to enter an alcohol rehabilitation program.

It must be noted that Board President, Mr. Miller, specifically testified that he had no idea whether or not Mr. Martin had a drinking problem, but indicated he would let the professionals determine that at an alcohol rehabilitation program, and that Martin would be none the worse by completing same. (R.13 Deposition of Miller, pp 53-54). Martin did enter and complete the alcohol program, and upon doing so returned to his custodial position. Martin testified in his deposition that during the alcohol rehabilitation program, he still did not believe he needed the treatment, and after it was completed, also felt he did not need the treatment. (R11 Motion for Summary Judgment, exhibit 1, Deposition of Martin, pp.51-53). Martin never followed up with any other type of rehabilitation treatment after he completed

the program. (R11 Motion for Summary Judgment, as exhibit 1, Deposition of Martin, p.55).

In December of 1994, a bus garage worker position and a bus driver position were posted. Martin bid for, and was denied these positions pursuant to the "safety concern" clause of the bargaining agreement. Martin grieved these decisions, and the matter was appealed to State Court. The Belmont County Court of Common Pleas upheld the actions of Barnesville, as a matter of "safety" and not "seniority." Thus, from July 2, 1996 until October 15, 1997, Barnesville was under that court's decision that Martin was not entitled to the positions. While the State Court appeal was pending, Martin filed charges of disability discrimination with the Ohio Civil Rights Commission in November 1996. In early 1998, Martin was awarded the December 1994 positions of bus garage worker and bus mechanic pursuant to the finality of the Seventh District Court of Appeals decision dated October 15, 1997.

Petitioner Martin instituted this action in September of 1997 claiming disability discrimination with regard to the denied positions. Barnesville filed a Motion for Summary Judgment which set forth numerous issues upon which summary judgment could properly have been granted. (R. 11 Motion for Summary Judgment). Martin argued, and continues to argue, that he signed the last chance agreement, stated therein that he had "a drinking problem," and therefore has "a record of" and is "perceived as" an alcoholic. As the trial court correctly found, Martin failed to allege, argue or demonstrate that he was perceived as having an impairment, that he was perceived as being substantially limited by that impairment, and/or failed to identify major life activities that

were so limited. (R.30 Order Granting Motion for Summary Judgment, pp.8-9). Martin did not rebut the testimony of witnesses who clearly stated that they did not know if Martin was an alcoholic, but merely that they did not want to take the chance that he would engage in similar acts of misconduct while driving a school bus. (R. 11 Motion for Summary Judgment, p.9, *citing*, exhibits 2- Lucas affidavit, 3- Wilson affidavit, 4- Rinehart affidavit, and 5- Miller affidavit).

Martin did not address the arguments advanced by Barnesville regarding the applicable McDonnell-Douglas/Burdine burden shifting analysis. (R. 14 Response to Motion for Summary Judgment). Martin also did not address Barnesville's argument under the law of *Maddox v. Univ. of Tennessee,* 62 F.3d 843 (6th Cir. 1995), that Barnesville did properly distinguish between Martin's misconduct and the alleged perceived "disability." Martin entirely skipped his proof on these issues. (R. 14 Response to Motion for Summary Judgment). Martin simply alleged perceived alcoholism and therefore disability.

Martin now advances theories of (1) an erroneous application of the "regarded as" inquiry; (2) several novel theories of recovery, not raised in either court below (heightened standard for a plaintiff under a burden shifting analysis and "regarded as" equals "*per se* disability") ; and (3) an alleged conflict among the circuits with respect to the disability *per se* argument as it relates to "perceived" alcoholism. All this, while failing to produce evidence from which a reasonably jury could find that Martin was even "perceived as" an alcoholic; failing to even address below that Martin was "perceived as" being substantially limited in a major life activity;

and failing to identify a major life activity perceived to be limited.

In short, Martin asks this Court to make numerous successive leaps in logic and inference, all of which are contrary to express statutory language, agency interpretive regulations and guidelines, and stated Congressional intent. Martin has skipped the proof on many issues, not the least of which is a *prima facie* showing of disability, and now asks this Court to declare him disabled despite his own default.

## ARGUMENTS IN OPPOSITION TO THE GRANTING OF CERTIORARI

This Court should properly deny the Petition for Writ of Certiorari submitted by Petitioner Dennis L. Martin, as it fails to present issues in conflict among the circuit courts, fails to set forth genuine issues in need of clarification by this Court with respect to important federal questions, and for reason that Petitioner Martin failed to raise many of these issues in either court below.

Specifically, Petitioner Martin suggests that there are conflicts (1) between the circuit courts as to whether or not alcoholism is a *per se* disability under the ADA and (2) between Justice Department and EEOC regulations which define "regarded as having such an impairment." With respect to a conflict among the circuit courts as to alcoholism as a *per se* disability, no such conflict exists, and the cases cited *infra.*, in Argument No. 3, Section A, indicate as much. Petitioner's citation to *Miners v. Cargill Communications, Inc.*, 113 F.3d 820 (8th Cir. 1997), as in conflict with the Sixth Circuit decision herein below is erroneous. With respect to conflict among agency regulations, Petitioner Martin misreads and/or

misunderstands the express language of both statute and regulation, thereby creating a false conflict, when in fact, it is only Martin who perceives conflict - not the circuits. Review of Appendices B and C indicate a plain misreading by Martin. Additionally, Petitioner Martin assigns errors with respect to the Sixth Circuit Court's ruling against him based on his own misconduct. This is the first time Martin has even responded to Respondent Barnesville's arguments with respect to misconduct. Martin wholly failed to address this area in either his Memorandum Contra Motion for Summary Judgment, his Sixth Circuit Appellate Brief or his Sixth Circuit Reply Brief. Nonetheless, the "misconduct exception" as it is termed, does not raise a plaintiff's burden of proof when raised by an employer, nor does it create a non-rebuttable non-discriminatory explanation for employer action. Ironically, it is Petitioner's own citation to *Miners v. Cargill Communications, Inc., supra.*, out of the Eighth Circuit which illustrates the fallacies in Martin's argument with respect to burden of proof in misconduct cases. Finally, Martin assigns as error, the lower courts' application of this Court's decision *in Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000). Ironically, not only did the lower courts correctly apply the *Reeves* analysis, but Martin's own citation to *Miners v. Cargill Communications, Inc., supra.*, illustrates how this is so. No further explanation is necessary from this Court regarding the issue of burden shifting and rebuttals of proffered employer explanations there being no departure from the *Reeves, supra,* standard.

Ultimately, Petitioner Martin has asserted arguments for which no conflict exists or no clarification is necessary from this Honorable Court. Petitioner Martin's own misreading or misunderstanding of express statutory and regulatory lan-

guage does not represent conflict or confusion among the circuits (or the Sixth Circuit) so as to create a necessity for this Court's review.

## ARGUMENT NO. 1

**Petitioner Martin Should Not Be Permitted To Raise Certain Issues For The First Time By Way Of His Petition For Writ Of Certiorari. *Bragdon V. Abbott*, 524 U.S. 624, 118 S.Ct 2196, 141 L.Ed.2d 540 (1998).**

Petitioner Martin advances several arguments or theories upon which he contends this Court should rely to overturn the decision of the Sixth Circuit Court of Appeals - theories that were not raised in either court below and therefore are not properly before this Court. *See, Bragdon v. Abbott*, 524 U.S. 624, 118 S.Ct. 2196, 2205 (1998) ("It is our practice to decide cases on the grounds raised and considered in the Court of Appeals,..."). Specifically, Martin has alleged:

(1) Justice Department regulations for the Rehabilitation Act and the EEOC regulations (and interpretive guidelines) for the ADA are in conflict and that because alcoholism is a *per se* disability under the Rehabilitation Act, the same must be true under the ADA. This argument was not advanced below and as such, Martin's Petition for Writ of Certiorari should properly be denied;

(2) Applying the "misconduct exception" to disability discrimination, without a time limitation, would give an unrebuttable non-discriminatory reason for the employer's adverse action. It is interesting that Martin now seeks to challenge the Sixth Circuit's ruling

tin now seeks to challenge the Sixth Circuit's ruling with respect to his "misconduct" and proof a "misconduct exception," when he entirely failed to address the issue in either his Memorandum Contra Motion for Summary Judgment, Sixth Circuit Appellate Brief or Sixth Circuit Reply Brief. It is also interesting that Martin relies on the McDonnell Douglas - Burdine burden shifting analysis, when Martin's lower court motions and briefs entirely avoided this argument. Martin presented no argument to rebut the legitimate explanation of Barnesville's action.

(3) "As applied, the misconduct exception is against the intent of Congress because Congress supplied a similar the (sic) misconduct exception in 42 U.S.C. 12114(A) concerning drug uses, Congress further limited the use of such exception concerning drug uses, while the Sixth Circuit has not limited the similar judge made rule as to alcoholics."(Pet.p.25).

Martin should not properly be permitted to raise these issues without having raised them in either court below.

## ARGUMENT NO. 2

**Contrary To Petitioner's Assertion, Application Of This Court's Decision In *Reeves V. Sanderson* To The Instant Case, Does Not Mandate A Jury Trial Based On The Evidence Produced.**

Petitioner Martin argues that the courts below failed to properly apply this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2109 (2000), and

particularly the analysis for burden shifting and inferences of discrimination presented to rebut an employer's legitimate non-discriminatory reasons for its action. Specifically Martin mistakenly claims: (1) he offered conflicting testimony of pretext so as to warrant submission of the issue to a jury; and (2) the District Court erred by requiring him to present "significant probative evidence" of pretext, and that in doing so the court made an improper determination of the persuasive nature of the evidence he presented. This, Martin argues, heightened the burden of a plaintiff attempting to prove pretext. These arguments are without legal and factual merit, and do not create a significant question for this Court's review.

In *Reeves, supra.*, this Court determined that, among other things:

> Certainly there will be instances where, although plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational fact finder could conclude that the action was discriminatory.
>
> Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include **the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered** on a motion for summary judgment.

*Reeves,* 120 S.Ct. at 2108. (Emphasis added).

> [I]f the record conclusively revealed some other, non-discriminatory reason for the employer's decision or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that "no discrimination had occurred," an employer would be entitled to judgment as a matter of law.

*Reeves*, 120 S.Ct. at 2109. (Emphasis added). A brief review of the evidence demonstrates that the case at bar is precisely the instance anticipated by the above quote. Further, Petitioner Martin's failure to apply the entire decision and import of *Reeves* does not make this an issue which must be clarified by this Court.

Martin essentially argues that he presented the LCA and rehabilitation certificate as proof of the "record of" his disability, and of Barnesville's pretext (*i.e.*, that they perceived him as being an alcoholic rather than being concerned for school children's safety). Martin contends this evidence rebuts Barnesville's proffered concerns for the safety of its students. Review of the facts here reveal that Martin's evidence is weak, does not prove or even lend inference to discriminatory intent on the part of Barnesville, and could not properly have led a rational fact finder to conclude there was discrimination.

### A. The Rehabilitation Certificate does not support Martin's claim.

First, the rehabilitation certificate is only proof that Martin attended a program. No diagnosis was made of (and the mere

certificate certainly does not reflect) alcoholism. No diagnosis was made of (and the mere certificate certainly does not reflect) a substantial limitation of any major life activity, nor does it show a record or perception of such.

**B. The Last Chance Agreement does not support Martin's claim.**

Martin relies on the LCA as proof that he was perceived as an alcoholic. Martin alleges that "a drinking problem" equals alcoholism, and then automatically assumes "disability." That is not a proper showing under the ADA, and the district court correctly concluded such. Martin did not produce evidence that Barnesville's board members or employees considered the LCA terminology "a drinking problem" the equivalent of alcoholism, or of a substantially limiting impairment as to any major life activity.

The mere words "drinking problem" do not necessarily equate to alcoholism or disability. In fact, as used by these parties, "a drinking problem" was meant to convey insubordination, misconduct, and a mistake by Martin involving the use of alcohol while on the job, an offense for which Martin should properly have been terminated. When specifically questioned on the use of the terminology, "drinking problem," Board President Robert Miller explained that he did not know if Martin was an alcoholic or if he just exercised poor judgment on that occasion. (See Deposition of Robert Miller [excerpts], attached hereto as Appendix A).

Appellant Martin at no time presented evidence to address or rebut this testimony. However, Martin does acknowledge that he only signed the LCA to keep his job, not to admit any

type of alcoholism. (R.11 Motion for Summary Judgment, exhibit 1- Martin deposition, p. 51).

Further, no evidence was proffered by Martin that tended to prove an improper motive on the part of Barnesville - and how could it, as Barnesville is charged with the education and safety of the children within the school district, from the time they catch the morning school bus until the time they are dropped off the bus at days' end. Martin overstates and misunderstands what this Court's decision in *Reeves* requires of the parties, and what the court below was looking for - namely relevant probative evidence, tending to prove or disprove Barnesville's explanation - not merely bald assertions.

Petitioner Martin did not address the above testimony or the fact that none of the four (4) witnesses who testified considered him to be an alcoholic. Applying *Reeves, supra.*, these four (4) witnesses, plus the ultimate function and duty of Barnesville with respect to the education and care of the children on its buses, was *abundant, independent evidence* which supported Barnesville's explanation for denying Martin the bus driving position. The district court did properly apply the *Reeves* standard for burden shifting, and Martin's mere disagreement or failure to recognize the difference does not warrant this Court's intervention or clarification.

Ultimately, what Martin refuses to understand, is that he failed to make the required *prima facie* showing. Martin failed to produce any evidence that he was perceived as an alcoholic. Assuming *arguendo* that he did make such proof, Martin entirely failed to allege, argue and/or produce evidence that he was perceived as being substantially limited in a major life activity. Martin also failed to identify said major

life activity. According to this Court's decision in *Reeves, supra.*, Martin did not pass the first hurdle of bringing such an action.

### C. Neither Court below "raised the burden of proof" aquired by a plaintiff.

Specifically, Martin claims that the District Court erred by requiring "significant probative evidence" to avoid summary judgment. The requirement of "significant probative evidence" did not create a new standard of proof for plaintiffs, but rather was a restatement that proffered evidence should be relevant, *i.e.*, having the tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable, than without the evidence. F.R.E. 401. It stands to reason that evidence being offered to prove a pretext, must do so, not merely raise collateral issues. Martin's evidence did not "tend to prove or disprove" any facts of consequence in this matter. The district court was not presented with evidence that created a conflict or genuine issue as to the truth or falsity of Barnesville's explanation for its denial of the school bus position to Martin. Martin's proffered evidence did not prove (or lend inference to) pretext or falsity on the part of Barnesville with regard to their actions or motivations. The semantics between "probative evidence" and "significant probative evidence" in no way assists Martin, because lack of evidence does not change: no proof of perceived alcoholism, no proof of perceived substantial limitation, and no proof that Barnesville's concerns for children's safety were false.

## ARGUMENT NO. 3

**Petitioner's Argument That The Term 'Regarded As' Should Be Construed To Allow Alcoholism As A *Per Se* Disability Is A Misreading And Misunderstanding Of The Statute And Agency Regulations Not Ambiguity Or Conflict Requiring This Court's Attention.**

Petitioner's Argument No.2 illustrates a misunderstanding of the prima facie elements of a claim under the Americans With Disabilities Act, **not ambiguity or a conflict**. Petitioner's argument serves only to cloud the true issue and, coincidentally, the fatal error in Petitioner's case, namely that he failed to **allege and/or argue or produce any evidence** that Petitioner was "perceived as" having an impairment (alcoholism) and that he was "perceived as" being substantially limited in a major life activity from said alcoholism.

### A. Petitioner's reading of the law and accompanying regulations is erroneous, and exhibits a fundamental misunderstanding of proof required for claims of a "perceived" disability.

Petitioner advances a convoluted argument with respect to the required showing under a "regarded as" claim under the ADA. Specifically Martin claims that he has:

> [The] impossible task of proving a negative. That is, if the Petitioner does not have a substantial limitation at all, how is it possible to prove that it actually limits a major life activity? In other words, no evidence can exist showing an employee is substantially limited in a major life activity, if the em-

ployee never had an impairment in the first place. (Pet. p.23.)

This is clearly a misunderstanding of what is required under a perceived disability claim.

As set forth in Barnesville Argument 4A, *infra.*, a plaintiff who claims to be regarded as disabled, must prove that he/she is *perceived as* being substantially limited in a major life activity as a result of a perceived impairment. This comports with the general premise of the ADA, that "The statute is not operative, and the definition [of disability] not satisfied, unless the impairment affects a major life activity." *Bragdon v. Abbott*, 118 S.Ct., 2196, 2204 (1998).

There is no actual limitation requirement unless the plaintiff is seeking to establish the claim as an actual disability (*i.e.*, actual impairment with actual substantial limitations). This is not a difficult concept. If a plaintiff claims to be regarded as disabled, they must prove that they are regarded as having an impairment and regarded as being substantially limited in a major life activity - whether or not the perception is correct. Very simply, Petitioner Martin's misunderstanding of the showing required (*i.e.*, a perceived substantial limitation of a major life activity) is not shared among the circuits and is not sufficiently compelling or in need of clarification for this Court to address.

**B. Contrary to Petitioner's assertion, there is no conflict between agency regulations in this area.**

Petitioner Martin misrepresents to this Court, a conflict between Justice Department regulations (drafted for implementation of the Rehabilitation Act) and EEOC regulations

(drafted for the ADA). Specifically, on page 20 of his Petition, Martin alleges that the Justice Department regulations and definitions do not require the showing that an employee is perceived as being substantially limited in a major life activity. This is clearly erroneous.

A quick reading of the Justice Department regulations, 28 C.F.R. 41.31(b)(4)(iii) (1999) (attached hereto as Appendix B) reveals that there most certainly is the required showing of perceived substantial limitation as to a major life activity. Martin's characterization of different wording between this regulation and that set forth in the EEOC's 29 C.F.R. '1630 (l)(3) (attached hereto as Appendix C) and 29 C.F.R. '1630 App.B '1630.2(l), *infra.*, is misleading at best. Martin's attempt to create a conflict worthy of this Court's attention is improper. The Petition may properly be denied on this basis.

## ARGUMENT NO. 4

### Contrary To Petitioner's Assertion, There Is No Conflict Among The Circuits As To Whether Or Not Alcoholism Is A *Per Se* Disability.

Martin's Petition claims that circuits other than the Sixth Circuit have determined that alcoholism is a disability under the ADA. (Pet.p22). This assertion is misleading, because there is no distinction made between an "impairment" (*i.e.*, the impairment of alcoholism) and a "disability" (defined as an "impairment that substantially limits one or more major life activities" or is perceived as being so limiting). Further, the cases cited in support of this proposition address other perspectives such as the Rehabilitation Act (*Office of the Senate Sergeant at Arms v. Office of Senate Fair Employ-*

*ment Practices*, 95 F.3d 1102 (Fed.Cir. 1996)), and the drug uses section of 42 U.S.C. 12114 (A)(*Buckley v. Consolidated Edison Co. of New York*, 127 F.3d 270 (2nd Cir. 1997)). Additionally, Martin's cite to *Miners v. Cargill Communications, Inc.*, 113 F.3d 820 (8th Cir. 1997), is not appropriate and actually undercuts his own arguments.

**A. The "impairment" of alcoholism is not a *per se* "disability" under the ADA.**

The law is very clearly established by this Court and the circuits, that "The statute [ADA] is not operative, and the definition [of a disability] not satisfied, unless the impairment affects a major life activity." *See, Bragdon v. Abbott*, 118 S.Ct. 2196, 2204 (1998). So too, is this true for perceived impairments, *i.e.*, that a perception of substantial limitation in a major life activity be shown. This is properly so, in light of the expressed statutory language requiring this showing, the agency regulations and guidelines (with definitions) and available Congressional intent.[1] The Circuit

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[1] As this Court well knows, in order to prevail on a claim under the Americans With Disabilities Act, Plaintiff must prove that:

1. The Plaintiff suffers from a "disability" as defined by the Act;

2. The Plaintiff was otherwise qualified for the employment; and

3. The Plaintiff either was denied a reasonable accommodation for his disability or was subject to an adverse employment decision that was made solely because of his disability.

Courts have articulated that alcoholism and perceived alcoholism are only "disabilities" within the meaning of the statute if there is proof of a substantial limitation as to a major life activity, or a perception of such limitation, as evidenced by the following cases cited. *See, Bilodeau v. Mega Indus-*

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*Roush v. Weastec, Inc.*, 96 F.3d 840, 843 (6th Cir. 1996).

In order to be considered "disabled" as defined under the ADA, the Plaintiff must suffer from one of the following:

> 1. A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> 2. A record of such impairment; or
>
> 3. Being regarded as having such an impairment.

42 U.S.C. '12102(2). This determination comports with the applicable EEOC regulations, which state in relevant part:

There are three ways in which an individual may satisfy the definition of "being regarded as having a disability":

> (1) The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity *as constituting a substantially limiting impairment*;
> (2) The individual may have an impairment which is only *substantially limiting* because of the attitudes of others toward the impairment; or
> (3) The individual may have no impairment at all but is regarded by the employer as having a substantially limiting impairment.

*See*, 29 C.F.R. '1630, App.B '1630.2(l). (Emphasis added).

*tries*, 50 F.Supp.2d 27, 38 (D. Me. 1999) (1st Cir.) (In the context of perceived alcoholism, ATo prevail under [29 C.F.R. 1630.3(1)(C)] Plaintiff must show that Defendant perceived her as disabled in the sense that she had an impairment that substantially limited a major life activity."); *Pace v. Paris Maintenance Company, et al.*, 107 F. Supp.2d 251 (S.D. N.Y. 2000) (2nd Cir.) (AAlcoholism is not a *per se* disability under the ADA..... "Pace must demonstrate that he was regarded as having an impairment [alcoholism] that substantially limited a major life activity.") and ("Thus, the comment must be construed as evidence that [employer] thought Pace had a drinking problem. Still, this evidence is not sufficient to demonstrate that [employer] perceived Pace's impairment to be substantially limiting." *Pace, supra*, at 261). *See also, Francis v. City of Meriden*, 129 F.3d 281, 284 (2nd Cir. 1997) ("To be considered disabled under the "regarded as" prong of the statutes, therefore, a plaintiff must allege that the employer regarded the employee to be suffering from an impairment within the meaning of the statutes, not just that the employer believed the employee to be somehow disabled."); *Kelly v. Drexel Univ.*, 94 F.3d 102, 109 (3rd Cir. 1996)("[W]e hold that the mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that that perception caused the adverse employment action."); *Forrisi v. Bowen*, 794 F.2d 931, 935 (4th Cir. 1986) ("The record demonstrates that the employer's perception accorded with these facts. Far from being regarded as having a "substantial limitation" in employability, Forrisi was seen as unsuited for one position in one plant--and nothing more."); *Burch v. Coca-Cola Co.*, 119 F.3d 305, 316-17 (5th Cir. 1997) (Holding that alcoholism is not a *per se* disability

under the ADA and evidence that alcoholics, in general, are impaired is inadequate to show the substantial limitation of one or more major life activities), *cert. denied*, 522 U.S. 1084, 139 L. Ed. 2d 768, 118 S. Ct. 871 (1998); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 885 (6th Cir. 1996) ("Under that provision [29 C.F.R. '1630, App.B '1630.2(l)], a plaintiff must show that the perceived impairment is a substantial limitation on a major life activity."). *See also, Byrne v. Board of Education*, 979 F.2d 560, 567 (7th Cir. 1992); *Wallin v. Minnesota Dep't of Corrections*, 153 F.3d 681, 686 n.4 (8th Cir. 1998) (*citing, Burch, supra.* and requiring that a plaintiff show impairment of a major life activity), cert. denied, 526 U.S. 1004, 119 S. Ct. 1141, 143 L. Ed. 2d 209 (1999); *Nielsen v. Moroni Feed Co.*, 162 F.3d 604, 608 (10th Cir. 1998) ("[I]n passing the ADA, Congress intended to protect individuals from employment discrimination by employers on the basis of an actual or perceived disability, provided that the disability substantially limits or is perceived to limit substantially a major life activity."); *Wilson v. Int'l Bhd. of Teamsters, Chauffeurs and Warehousemen, et al.*, 47 F.Supp.2d 8 (D.C. D.C. 1999) ("Alcoholism is not, however, a per se disability.... 'Wilson's burden is thus to demonstrate that [the employer] regarded him as being substantially limited in a major life activity.' " *citing*, 29 C.F.R. 1630.2(j)(3); *Witter v. Delta Air Lines, Inc.*, 138 F.3d 1366, 1369 (11th Cir. 1998). *See also, Deas v. River West, L.P.*, 152 F.3d 471, 482 (5th Cir. 1998 ) (finding no evidence from which a reasonable jury could infer that the employer regarded Deas as substantially limited in her ability to work).

**B. Petitioner Martin's reliance upon the Eighth Circuit decision in *Miners v. Cargill Communications, Inc.*, is misplaced and in fact contradicts his own arguments.**

Petitioner Martin cites to *Miners v. Cargill Communications, Inc.*, 113 F.3d 820 (8th Cir. 1997), for two propositions:

1. Alcoholism is considered a "disability" under the ADA (Pet.p.22); and
2. An employer's use of employee misconduct as a "misconduct exception" creates an unrebuttable non-discriminatory explanation, which is too difficult for a plaintiff to overcome. (Pet.p.25).

It is interesting that Martin should cite to Miners as support when in fact *Miners v. Cargill Communications, Inc.* is factually dissimilar to Martin's case, ultimately illustrates the fatal weaknesses in Martin's proof, and actually disproves Martin's own arguments with respect to an employer's use of the "misconduct exception."[2]

**1. Petitioner's cite to *Miners v. Cargill Communications, Inc.*, is not appropriate.**

Petitioner's cite to *Miners, supra.*, is inappropriate because the Eighth Circuit Court did not address the main issue raised herein, *i.e.*, whether or not an employee must prove their employer perceived them to be substantially limited in

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[2] As stated above, Petitioner Martin wholly failed to address the misconduct arguments set forth by Respondent Barnesville - IN EITHER COURT BELOW. This Court should properly deny Martin's Petition for a Writ of Certiorari on this ground.

any major life activities, rather than simply being perceived as being an alcoholic. As the U.S. District Court for the S.D. Ohio correctly concluded below (and as echoed by the string cite of cases shown above), it is not enough to show perceived alcoholism. A plaintiff must also show that they are perceived as being substantially limited. *Miners* does not address this, and as such is not an appropriate citation for this inquiry.

Additionally, *Miners* is factually dissimilar to the present case. In Miners, the plaintiff was a management employee of the defendant company. On one occasion the plaintiff informed her supervisor that she was late to work because she had been out late drinking the evening prior. The supervisor claimed to have been concerned over plaintiff's drinking and possible driving of a company vehicle, while intoxicated. The supervisor hired an investigator to follow the plaintiff after work. The investigator followed the plaintiff while driving her company vehicle to a local bar. Later that evening, the investigator observed the plaintiff exiting the bar. The investigator stopped her, identified himself as working for her employer, and took her keys. The investigator then drove off with the vehicle. The plaintiff was subsequently terminated for violating the company's policy of driving company vehicles, while intoxicated.

The plaintiff's employer explained that plaintiff was fired for her misconduct, ( *i.e.,* driving a company vehicle while intoxicated). The *Miners* court concluded that plaintiff's presentation of evidence sufficiently rebutted the employer explanation for her termination by showing that: (1) the company knew of other managers who drove company vehi-

cles while intoxicated - and did not fire those employees; (2) the company did not actually inquire or investigate into whether or not plaintiff had actually been drinking alcohol at the bar; and (3) the company did not in fact have a written policy speaking to this issue.

Obviously, the plaintiff in *Miners* set forth more probative evidence, than did Martin in the instant case. Further, Miners' proof spoke specifically to a possible pretext by her employer, including different treatment for other employers. Martin offered no such probative evidence tending to disprove the basis for Barnesville's decision or its motivations.

As can be gleaned from the above analysis, Martin's cite to *Miners* only serves to illustrate the weakness (or absence) of his proof in the face of other abundant independent evidence that supports Barnesville's decisions and its motivations. *Reeves, supra.*, 120 S.Ct. at 2108.

**2. Petitioner Martin's arguments with respect to the "misconduct exception" do not present a circuit conflict or need for clarification by this Court. The decisions of the lower courts were entirely proper and do not warrant review or clarification by this Court.**

With respect to Martin's argument that an employer might utilize the "misconduct exception" as it is being referred to, to implement discrimination against persons wrongly perceived as being alcoholics and that any such showing of misconduct by the employee would presumably insulate them

from liability, *Miners* clearly holds to the contrary.[3] The *Miners* case clearly illustrates how such explanation is properly rebutted by a plaintiff, so as to overcome summary judgment.

A misconduct explanation, like all other explanations put forth by an employer, is subject to rebuttal by the plaintiff. If in fact an employer produces a misconduct explanation, both the misconduct and the explanation can be proven or disproved. This was precisely the case in *Miners*. The *Miners* plaintiff produced evidence that she had not broken a written company policy (because it did not exist); was treated differently from other managers; and HAD NOT EVEN BEEN PROPERLY INVESTIGATED TO DETERMINE IF SHE HAD ACTUALLY ENGAGED IN THE CLAIMED MISCONDUCT.

Query as to whether or not misconduct is a more difficult explanation to overcome when the plaintiff did, in fact engage in the misconduct for which he was accused and possi-

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[3] It is also worth noting that Martin makes this self serving argument, *i.e.,* that an employer's use of an employee's own misconduct would be an unrebuttable, non-discriminatory explanation and that it would be too difficult to disprove or overcome in the burden shifting analysis - is ironic at best, considering that it is an employee's own misconduct that is at issue. It is ironic that Martin seeks protection from employers' actions, ... the same employers who must ultimately be responsible for employee misconduct occurring in the course and scope of their duties.

bly fired? Perhaps so, but what is an employee doing, if not jeopardizing his job, when he knowingly undertakes misconduct? What consequences does he expect, when violating company policies? What does an employee expect when he brings alcohol to his job at an elementary school, opens and drinks it, and then runs, hides and lies about it when discovered? These are the legitimate and non-discriminatory reasons for disciplining an employee in the first place. Should that change merely because an employee's misconduct may involve his or her own use of alcohol? The answer is quite clearly no. The reason for this is simple, an employee must properly prove his or her prima facie case to be protected by the ADA. Most relevant to this inquiry, is the element of perceived substantial limitation as to a major life activity. Without this showing, an employee's own misconduct is just that - and being disciplined for the same is not discrimination.

Nevertheless, when rebutting a misconduct explanation, it is simply incumbent upon the employee to prove that either he did not engage in the alleged misconduct, he was disciplined differently than others or for some reason other than merely the misconduct, that the employer's explanation is false in fact or in motive, and/or that the misconduct does not relate to the employer's ultimate actions with respect to the employee. This is not a new or different standard. As actually proven in *Miners*, a misconduct explanation is not "unrebuttable" and there is no conflict or need for further clarification than that set forth in *Reeves v. Sanderson., supra.*

Furthermore, the above analysis may or may not involve an "impairment" or "disability" and may or may not involve the impairment of alcoholism. Misconduct of many kinds (which may or may not stem from an impairment or disability) would find an employee in trouble and subject to employer action. If it was not significant misconduct or was not proven misconduct, then a plaintiff can more easily rebut the allegations as a pretext. If misconduct is proven, shown to be serious, in violation of policies, and with implications of safety and security, then a plaintiff will need to prove with relevant probative evidence why the proffer of a misconduct explanation (and or the employer's motivation or intent) is false or a pretext for something else. This is not more difficult because of a heightened standard of proof, but because such actions usually warrant employer intervention for purposes of preventing their own liability, if nothing else.

In the instant case, the Sixth Circuit correctly concluded that:

> The ADA does not protect a plaintiff from his own bad judgment. The plaintiff cannot force defendant to hire him as a school bus driver when there is a serious risk that he may again drink on the job, have an accident and kill a group of school children. Any suggestion to the contrary is absurd. ... Therefore, even if we assume that plaintiff has established a prima facie case of discrimination, defendant has articulated a legitimate, non-discriminatory reason for its actions. Plaintiff has not demonstrated that this stated reason is a pretext for any unlawful discrimination.

(See Court of Appeals Opinion, contained in Petitioner's Appendix at page 8a). The Court below properly considered that Martin must produce, and in fact failed to produce, evidence of pretext upon which reasonable minds could find in his favor.

## CONCLUSION

For reasons that: Petitioner fails to raise issues of significant conflict or confusion among the circuits; failed to raise several issues in either court below; failed to understand and apply this Court's decision in *Reeves, supra*; failed to make even a prima facie or baseline showing of perceived disability, and because there is no conflict with respect to a court's inquiry when faced with a claim for perceived alcoholism, this Court should not grant Petitioner's request for a Writ of Certiorari as to the issues raised.

Respectfully submitted,

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# APPENDIX A – DEPOSITION OF BARNESVILLE EXEMPTED VILLAGE SCHOOL DISTRICT BOE, BOARD PRESIDENT ROBERT MILLER (EXCERPTS)

Deposition of Robert Miller (excerpts)

By Mr. Lillard:

Q. Now, it has on the first page paragraph titled No. 1, it says, "Employee Dennis Martin admits that he has a problem with consumption of alcohol; he has a 'drinking problem.'" Do you know who drafted that terminology?

A. Well basically the reason that sentence was in there was Denny Martin had denied that he ever drank that beer. It was my word against Denny's. The board knew that. Chester [Kenny] had not been a witness to it. There had only been two people there. My integrity was on the line. Mr. Atkinson, I believe, still was on the board at the time, as well as part of the settlement wanted to know the truth. As part of the settlement, he requested through their attorneys that Mr. Martin admit that he was drinking that night. And he did so. That's why the sentence was there. It's an admission that "Yes,

*Appendix A*

Rob [Miller] was not lying that night. He did catch me drinking."

(R.13 Miller deposition, p.36).

By Mr. Lillard

Q. Okay. So what was the intent of that statement?

A That was the gist of the statement, that he was drinking that night and has made a mistake in drinking.

(R.13 Miller deposition, p.37).

There is additional evidence that Barnesville (through its board members and employees) did not consider the LCA a finding of "alcoholism." Again, Robert Miller explained:

Q. All right. Now, it [the settlement agreement] indicates in order for him [Martin] to keep his job, he is required to go through a 28-day alcohol rehabilitation program, does it not?

A. Yes.

Q. And that's a pretty significant program is it not?

Mr. Albert: Objection. Go ahead.

*Appendix A*

A. **Well, our reasoning was this: That we don't have the expertise to determine whether Mr. Martin has a problem, does not have a problem; whether it was just a one time shot and he screwed up. The board's position was that he made a mistake. If the detox program, who has trained people, was able to help him if he did have a problem it would correct that situation. I[f] he didn't have a problem, then he'd come out a better person. But it was our- We insisted that he had to attend this detox program for their determination. Not only to help himself, but because we are not -do not have the expertise to determine whether he does have a drinking problem or does not have a drinking problem.**

Q. So you didn't know whether it was a one time incident, the first time he's ever done it or-

A. It's the only time I ever observed him drinking.

Q. - or whether he was a chronic alcoholic?

*Appendix A*

A. I had no knowledge.

(R. 13 Miller deposition, p.38). (Emphasis added).

## APPENDIX B – 28 C.F.R. 41.31(b)(4)(iii)

## TITLE 28 – JUDICIAL ADMINISTRATION

## CHAPTER I – DEPARTMENT OF JUSTICE

PART 41– IMPLEMENTATION OF EXECUTIVE ORDER 12250, NONDISCRIMINATION OF THE BASIS OF HANDICAP IN FEDERALLY ASSISTED PROGRAMS - Table of Contents

Subpart B – Standards for Determining Who are Handicapped Persons

Sec. 41.31 Handicapped person.

(a) Handicapped person means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

(b) As used in paragraph (a) of this section, the phrase:

(1) Physical or mental impairment means:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardio

vascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) Major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) Has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) Is regarded as having an impairment means:

*Appendix B*

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a recipient as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (b) (1) of this section but is treated by a recipient as having such an impairment.

## APPENDIX C – 29 C.F.R. § 1630(1)(3)

## TITLE 29 – LABOR COMMISSION

PART 1630 – REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT - Table of Contents

Sec. 1630.2 Definitions. (In relevant part)

(l)Is regarded as having such an impairment means;

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraph (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.